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Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1996

DONALD GREEN,

Petitioner,

vs.

PHILADELPHIA HOUSING AUTHORITY; WILLIAM BERGMAN, INTERIM CHIEF OF POLICE; DANIEL ROSENSTEIN, CAPTAIN; JOHN CRESCI, DEPUTY CHIEF, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS OFFICIALS OF THE PHILADELPHIA HOUSING AUTHORITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A GOVERNMENTAL EMPLOYER MAY PUNISH AN EMPLOYEE FOR PROTECTED SPEECH WHERE THE EMPLOYER DOES NOT IN FACT BELIEVE THAT THE SPEECH WILL CAUSE ANY DISRUPTION AND USES THE POSSIBILITY OF DISRUPTION AS A PRETEXT TO PUNISH THE CONTENT OF THE SPEECH.

II. WHETHER THE CAUSE OF ACTION CREATED BY 42 USC § 1985(2) WHICH BY ITS OWN TERMS REQUIRES ONLY A SHOWING OF A CONSPIRACY TO PUNISH A WITNESS FOR AN APPEARANCE OR TESTIMONY IN A FEDERAL JUDICIAL PROCEEDING CAN BE DEFEATED BY A PUBLIC EMPLOYER'S CLAIM THAT TESTIMONY WOULD BE "POTENTIALLY DISRUPTIVE" TO THE WORKPLACE.

PARTIES TO THE PROCEEDINGS

Petitioner, Donald Green, was the plaintiff in the district court and appellant in the court of appeals.

Respondent Philadelphia Housing Authority is a governmental unit that operates public housing in Philadelphia, Pennsylvania. Respondents William Bergman, Daniel Rosenstein, and John Cresci, at the time the suit was filed, were respectively the Interim Chief of Police, Captain, and Deputy Chief in the Philadelphia Housing Authority Police Department.

Respondents were defendants in the district court and appellees in the court of appeals.

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PETITION FOR CERTIORARI

Donald Green respectfully petitions for a writ of certiorari to review the judgment of the United State Court of Appeals for the Third Circuit in this Case.

OPINIONS BELOW

On January 31, 1997, the United States Court of Appeals for the Third Circuit issued its opinion, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania. App. 1a. The Third Circuit issued an Order Amending the opinion on March 13, 1997. App. 20a. The original Third Circuit opinion is reported at 105 F.3d 882. The trial court granted judgment as a matter of law in favor of the respondents in open court on October 13, 1995. App. 26a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Third Circuit. The Court issued an Opinion and judgment on January 31, 1997. On a Petition for Rehearing, the Court of Appeals on March 13, 1997 issued an Order amending the Opinion and denying the Petition for Rehearing. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1985(2)

If two or more persons in any State or Territory deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . . the party injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.

STATEMENT OF THE CASE

Procedural History:

This action was filed by Petitioner Donald Green in May, 1994. The Complaint alleged that the respondents, Philadelphia Housing Authority ("PHA"), and three senior officials in the PHA Police Department (Chief William Bergman, Captain Daniel Rosenstein and Deputy Chief John Cresci) violated petitioner's rights under the First Amendment, 42 U.S.C. § 1985(2), and the Constitution of the Commonwealth of Pennsylvania, when they removed him from his position as a police officer in the PHA Drug Elimination Task Force ("Task Force") because of his appearance, which had been authorized in advance by PHA, as a character witness at a bail hearing for a federal criminal defendant.

The case proceeded to a trial before a jury on October 10, 1995. At the close of testimony, the district court dismissed the case pursuant to Rule 50, F.R. Civ. P. On appeal, the Court of Appeals for the Third Circuit affirmed the dismissal of the claims.

The Facts:

Petitioner, Donald Green was appointed as a permanent police officer at PHA on November 6, 1991. In February 1994, petitioner was assigned to the Task Force and served effectively until the time of the events that engendered this lawsuit.

On March 21, 1994 petitioner received a call from a Norman Keller, a friend for 20 years, who told petitioner

that his son Herbert Keller had been arrested for bookmaking. Mr. Keller requested petitioner to appear as a character witness at his son's bail hearing in federal court.

On March 22, 1994, petitioner, pursuant to PHA directives, made a written request to his immediate supervisor for permission to testify as a character witness. The supervisor gave express approval for petitioner's appearance as a character witness.[1]

On March 23, 1994, petitioner appeared as a character witness in the federal proceeding and stated that he was a police officer with PHA. The Magistrate Judge then stated the pending charges (including charges related to organized crime) and petitioner, who previously had been unaware of the exact nature of the case, told Mr. Keller that he could no longer be associated with the case.

Later that day, an unidentified law enforcement official called respondent Daniel Rosenstein (Captain of the Task Force) and informed him that petitioner had appeared as a character witness. On March 24, Rosenstein sent a memorandum to Deputy Chief Cresci outlining concerns about petitioner's court appearance and requested an investigation into his association with Herbert Keller. Petitioner was removed from the Task Force and Rosenstein informed Cresci that petitioner's status would be dependent on the results of the investigation. At the same time, Rosenstein assured petitioner that if the

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[1] Respondent Cresci confirmed that petitioner properly followed the chain of command and PHA directives in his request for permission to testify in federal court.

investigation cleared him of any wrongdoing, he would be reinstated in the Task Force.

Upon receipt of Rosenstein's request for investigation, Cresci discussed the matter with the Acting Chief of Police, respondent William Bergman. Cresci and Bergman decided that *no* investigation was necessary since no federal or state law enforcement officials had contacted them with any complaints or information about petitioner; they determined that there was no reason to suspect that petitioner had any questionable associations with criminal activity.[2]

Notwithstanding this determination, respondent Cresci informed petitioner that he was being moved from the Task Force because of his appearance as a witness at the federal court proceeding and that he would never be reinstated.

Through the date of the trial in this case (18 months after the incident), respondents had received no negative or adverse information about petitioner. Respondents Bergman and Cresci testified that they had no suspicion that petitioner was in any way involved with organized crime.

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[2] In a pre-trial deposition respondent Rosenstein testified that he could not reinstate Green until the investigation he requested was conducted. He further stated that he had been told by defendant Cresci that the investigation was on hold pending the outcome of this civil lawsuit.

In direct contradiction of this testimony, respondent Cresci testified that he informed Rosenstein by March 25, 1994 that there was no need for an investigation.

At trial, respondents presented no evidence suggesting that petitioner's testimony had resulted or was likely to result in any actual or potential disruption to the mission of PHA.[3]

Rather, respondents attempted, for the first time, to justify the denial of reinstatement of petitioner to DETF on the grounds that they were awaiting the outcome of the federal criminal investigation into the "Stanfa" organized crime family, an assertion not made in any of their depositions. Respondent Cresci could give no explanation of how the conclusion of the federal trial against Stanfa would give PHA any guidance or information relative to petitioner's placement in the Task Force.

The district court granted respondents' motion for judgment as a matter of law and the court of appeals affirmed this ruling on the grounds that evidence of pretext on the part of respondents was "irrelevant" on the facts of this case.

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[3] Respondent Bergman testified petitioner was a good police officer, that no investigation was necessary, and that petitioner could be reinstated in the Task Force. He also stated that if there were any question about petitioner's associations, plaintiff would have been dismissed from the force.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO MAKE CLEAR THAT A GOVERNMENTAL EMPLOYER MAY NOT PUNISH PROTECTED SPEECH UNLESS THE EMPLOYER IN FACT BELIEVES THAT THE VALUE OF THE SPEECH IS OUTWEIGHED BY ITS POTENTIAL FOR DISRUPTION.

In an opinion that disregards settled Supreme Court precedent and directly conflicts with the analysis of three other circuits, the court below ruled that evidence of pretext is "irrelevant" in determining the constitutionality of a public employer's asserted reason for sanctioning an employee for his protected speech. Specifically, the court below ruled that even where the governmental employer does not believe that protected speech will cause disruption, it may nonetheless sanction an employee so long as a reasonable employer could have "objectively" believed that the speech was potentially disruptive. The decision below creates confusion and uncertainty where the law seemed settled, by finding pretext to be irrelevant in a governmental employee free speech case.

Just three years ago this Court addressed the circumstances under which a public employer may sanction an employee for allegedly disruptive public statements. *Waters v. Churchill*, 114 S. Ct. 1878 (1994). The Court divided on how potential disruptiveness should be evaluated, but every Justice of this Court reaffirmed the proposition that where the public employer's subjective reason for sanctioning an employee is hostility to the employee's protected speech and the asserted "potential for disruptiveness" is a pretext, the sanction violates the First

Amendment. *Waters v. Churchill, supra* at 1889, 1891, O'Connor, J.; at 1891-92, Souter, J.; at 1895-96, Scalia, J.

The government's "mission as an employer" may justify sanctioning employee expression that threatens to disrupt that mission but the government cannot rely on a prediction of disruption which it does not hold in good faith. Justice O'Connor, for the Court's plurality, stated that even where as a matter of law the reasons given by the employer for the dismissal were sufficient to outweigh the first amendment interests of the employee, a trial was still necessary to decide the employer's "actual motivation," *id.* at 1891, if a reasonable fact finder could find that the dismissal was a result of the employer's "hostility" to the employee's protected speech.

Justice Souter observed in his concurrence, "A public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression." *Id.* at 1891. On this point this Court was unanimous.

Justice Scalia, in expressing his disagreement with the Court's resolution of the issue regarding the requirement for adequate investigation of the report of improper conduct of the employees, pointedly argued that the long-standing pretext principle provided sufficient protection for an employee who claims speech related retaliatory conduct. According to Justice Scalia, the "availability of a pretext inquiry into the genuineness of a public employer's asserted permissible justification . . . is all that is necessary to avoid the targeting of 'public interest' speech condemned in *Pickering*." *Id.* at 1895-96.

Justice Scalia's approach is direct: if an employer acts in good faith on an erroneous report there is by definition no retaliation for speech. But if the report is used as a pretext and the real reason for the dismissal is speech, unconstitutional retaliation is established.[4]

Further, until the decision of the court below, the circuit courts that had addressed the issue were in accord. The Court of Appeals for the Second Circuit provided a cogent statement of the relevant principle:

> "Thus, even if the potential disruption to the office outweighs the value of the speech, the employer may fire the employee only *because of* the potential disruption, and *not because of* the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such "retaliatory" discharge is always unconstitutional." *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996) (emphasis in original).

See also, *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) ("Whittled to its core, *Waters* permits . . . [firing only] if . . . the employer took action against the employee based on this disruption and not in retaliation for the speech."); *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996) (where employer fails to show that he sanctioned employee because of any actual or perceived worry about

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[4] In dissent, Justice Stevens and Justice Blackmun would have gone further than the plurality by making the employer's decision subject to judicial factual review. The dissent accepts the pretext principle, but finds it insufficient to protect first amendment rights.

disruption, there is lack of good faith and a violation of First Amendment); *Dunn v. Carroll*, 40 F.3d 287, 293 (8th Cir. 1994) (rejecting a defense on the merits and denying qualified immunity "if there is a question of fact as to whether [the defendants] reasonably believed the conduct to be disruptive").[5]

The court below correctly determined that petitioner's fully authorized appearance as a character witness was a matter of public concern and therefore protected by the First Amendment. The court held, however, that under the applicable balancing test (See *Waters v. Churchill*, 114 S. Ct. 1878 (1994)), a "potential for disruptiveness" that could result from his appearance at the bail hearing outweighed petitioner's first amendment interests. App. 15a. While that judgment may be valid in some circumstances, it can justify sanctions against an employee only where the employer actually believes that the speech presents a potential for disruption.

In this case, the court below did not dispute the substantial evidence presented at trial that the respondents did not believe that there was a potential for disruption and that they retaliated against petitioner for his protected speech – his appearance, with their express permission, as a character witness for a defendant at a

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[5] Of course, there is nothing particularly new in the insistence that governmental action that might be justified by some secondary characteristic of the speech in question violates the constitution where the government in reality acts on a desire to suppress or punish that speech. See, e.g., *Rankin v. McPherson*, 483 U.S. 318 (1987); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

federal bail hearing. The three individual respondents provided conflicting and inconsistent reasons for the adverse actions taken against petitioner. Captain Rosenstein testified that he requested an investigation into petitioner's associations with the defendant Herbert Keller and stated that he would consider reinstating petitioner if no adverse information was developed. But within days of this request, Acting Chief of Police Bergman and Deputy Chief Cresci decided that no investigation was necessary and that there was no information to indicate that petitioner had done anything wrong or was in anyway associated with organized crime. Incredibly, at trial, Rosenstein insisted that he was still awaiting the results of an investigation.

There was direct proof of retaliation: respondent Cresci told petitioner that he was being transferred because of his appearance, and that he would not be reinstated. And there is compelling evidence that the actions taken by respondents were motivated not by a concern with disruption, but to deflect criticism of their own policies and the fact that they had authorized petitioner to appear at the hearing. It will be recalled that Captain Rosenstein was informed of petitioner's appearance by a phone call from an unidentified law enforcement official. Rosenstein then informed his superiors, respondents Bergman and Cresci, that petitioner had received approval for his appearance as a witness from his Sergeant, as required by PHA regulations. Thus, even though respondents did not believe that petitioner's appearance in court created a potential for disruption, they had every reason to be embarrassed by the call from a federal law enforcement official. This inquiry called into

question official PHA policy and respondents' own decision making. In response, as petitioner proved at trial, respondents sought to place the blame on him and imposed sanctions to cover their own perceived errors. In this context, it is telling that the respondents' stated reasons for their actions have shifted at each stage of the litigation and that they have directly contradicted each other in their testimony.[6]

In the face of this considerable evidence of the pretextual nature of the respondents' alleged concerns and the likelihood that the respondents' actions were retaliatory in intent – evidence which in the usual course of events should have gone to the jury – the court below ruled that "under the facts of this case any pretext is irrelevant." App. 20a.

As noted above, this ruling is dangerously at odds with *Waters v. Churchill, supra* and is inconsistent with the rulings of three other circuits. The approach adopted by the Third Circuit invites public employers to retaliate

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[6] Although the court below quoted the respondent's *appellate brief* for the proposition that they were concerned that petitioner might "tarnish" the image of the PHA, App. 14a, there was no such testimony at trial.

The court below asserted that potential for disruption was established by (1) an anonymous call to PHA reporting Green's appearance at the bail hearing and (2) Green's testimony about fellow officers disparaging remarks about his appearance. These "reasons" are spurious: the respondents have never claimed that the anonymous call was any evidence of disruption (indeed, it could well have been an officer who wanted to punish Green for his speech). Further, the respondents never claimed at trial that they knew of or acted because of the reactions of any other police officers.

against public expression that is not to their taste, and then to cloak the retaliation in spurious post-hoc rationalizations. By contrast, the approach taken by this Court and the other courts of appeals is entirely sensible: the relatively broad discretion granted to government employers in sanctioning protected speech based on predictions of disruption is predicated upon the proposition that the government employer is actually pursuing legitimate public goals in making those predictions. If supposed prediction of disruption is a mask for an impermissible desire to retaliate against protected expression, the basis for relying on the employer's judgment evaporates. In such a situation, the analysis of the Second, Eighth and Tenth Circuits precludes the employer from abridging the employee's first amendment rights. This Court should grant certiorari to resolve the conflict in favor of the majority of Circuits to have addressed the issue.

The court below sought to distinguish between two types of pretext: first, what the court regarded as improper pretext, where the employer has reasonable grounds to sanction the employee, but does so for reasons unrelated to the speech; and second, what the court defines as "irrelevant pretext," again where the employer has reasonable grounds for sanctioning the employee on the basis of the speech, but does not believe that there is any potential of disruption or need to protect its interests, and seeks to punish the employee for the content of the speech.

From a first amendment perspective, the two situations are identical. It is incoherent to disallow an employer to rely on a non-speech related motive, but to

permit the use of a motive grounded in the very speech at issue. Indeed, the latter situation may present even greater threats to first amendment values since it is even more apparent that the government is retaliating because of a disagreement with content of the speech.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT QUESTION WHETHER THE CAUSE OF ACTION CREATED BY THE CIVIL RIGHTS ACT, 42 USC § 1985(2), FOR CONSPIRACIES TO INJURE WITNESSES IN FEDERAL COURT PROCEEDINGS, SHOULD BE LIMITED IN ANY MANNER BY CONSIDERATION OF THE GOVERNMENT'S ASSERTED INTERESTS IN PREVENTING DISRUPTION CAUSED BY THE TESTIMONY IN COURT.

Section 1985(2), which originated in the 1871 Ku Klux Klan Act, provides a federal cause of action for conspiracies "to deter by force, intimidation or threat any party or witness in any court of the United States from attending such court or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." It "aims at conspiracies, the object of which is intimidation of or retaliation against parties or witnesses . . . in any court of the United States." *Brawer v. Horwitz*, 535 F. 2d 830, 839 (3d Cir. 1976). As this Court observed in *Kush v. Rutledge*, 460 U.S. 719, 726-27 (1983), this statute is "institutionally linked to federal interests" rather than to any constitutional protections under the Fourteenth Amendment. "Protection of

the processes of the federal courts was an essential component of Congress' solution to disorder and anarchy in the Southern States. Neither proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses and juror in federal courts."

In recent years, the statute has been invoked in various circumstances to protect actual or potential federal witnesses from a variety of forms of conspiracy to intimidate them. See, e.g., *Kush v. Rutledge, supra*; *Brever v. Rockwell International*, 40 F.3d 1119 (10th Cir 1994); *Chahal v. Paine Webber Inc.*, 725 F.2d 20 (2d Cir 1984); *Malley-Duff & Associates Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir 1985), affd. 493 U.S. 143 (1986).

In this case, there was evidence from which a jury could find that the transfer of petitioner resulted from the combined and coordinated actions of the respondents to punish petitioner for his appearance as a character witness in federal court. In summarily rejecting the § 1985(2) claim, the court below adopted the novel view that the same balancing considerations that control the First Amendment analysis dispose of the § 1985(2) claim. Even if the court below was correct in its interpretation of First Amendment doctrine, petitioner's claim under § 1985(2) is still viable unless this statute is viewed simply as a codification of first amendment principles in cases involving governmental employers.

Such a view, however, flies in the face of this Court's analysis in *Kush* which unanimously rejected the argument that a Section 1985(2) plaintiff must show the "invidious animus" necessary to establish a deprivation

of "equal protection or equal privileges and immunities." The Court reasoned that the statute's effort to protect federal witnesses rests on a separate federal authority, rather than being merely a shadow of other constitutional rights. Thus, the elements of the Section 1985(2) action should be derived from its own statutory language and legislative history.

The *Pickering* rule, upon which the court below relied, is premised on the proposition that government employers, like private employers, may regulate employees in the interest of effective job performance, *Waters v. Churchill, supra,* at 1887-88, and that the interest of the employer must be balanced against the rights conferred by the First Amendment. In Section 1985(2), however, Congress struck the relevant balance itself and condemned interference with the functioning of the federal judicial system without reference to competing employment interests.

Section 1985(2) does not allow private employers discretion to coordinate retaliation against federal witnesses in the interest of job performance. Thus, for example, in *Chahal v. Paine Webber, Inc.*, 725 F.2d 20 (2d Cir. 1984), the court entertained an action based on a claim that a securities broker had been threatened with discharge if he testified on behalf of a securities plaintiff. The fact that retaliation against the employee might substantially advance a business purpose of the employer did not permit the private employer to discipline the employee for a prospective appearance in court. Congress has given no indication that public employers should be treated differently, and there is no precedent supporting the lower court's determination that petitioner's statutory

right to be free from retaliation can be defeated by the fears of "potential disruption."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Donald GREEN, Appellant

v.

PHILADELPHIA HOUSING AUTHORITY; William Bergman, Interim Chief of Police; Daniel Rosenstein, Captain; John Cresci, Deputy Chief, in their Individual and Official Capacities as Officials of the Philadelphia Housing Authority.

No. 95-1908.

United States Court of Appeals,
Third Circuit.

Argued June 12, 1996.

Decided Jan. 31, 1997.

Before: SCIRICA and ROTH, Circuit Judges and RESTANI, Judge, Court of International Trade.*

OPINION OF THE COURT

SCIRICA, Circuit Judge.

The Philadelphia Housing Authority transferred one of its police officers from special drug enforcement duty to regular patrol duty after his appearance at a bail hearing as a character witness for a reputed organized crime associate. The officer contends his transfer violated his free speech and association rights. At trial, after the close of all evidence, the district court granted defendants

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* The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

judgment as a matter of law under Fed.R.Civ.P. 50. We will affirm.[1]

I. Background

The plaintiff, Donald Green, has been employed as a police officer for the Philadelphia Housing Authority Police Department since November, 1991. In February, 1994, he was assigned to the Housing Authority Police Department's Drug Elimination Task Force ("DETF"). The DETF is a special unit that works together with other law enforcement agencies to combat illegal drug activity on Philadelphia Housing Authority property.

Several weeks after his assignment to the DETF, Green received a telephone call from Norman Keller, a friend of over twenty years, asking him to testify as a character witness on behalf of his son, Herbert Keller, at a bail hearing in federal court. Pursuant to Housing Authority Police Department regulations, Green made a written request to his immediate supervisor for permission to testify. Green received approval, provided that he testify during his lunch hour and in civilian clothing.

On March 23, 1994, Green appeared at the bail hearing, and Keller's attorney introduced him by name and occupation. The magistrate judge then proceeded to read the charges pending against Keller, which included organized crime activity in connection with the Stanfa crime organization. Green, who until that time was unaware of

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[1] We have jurisdiction under 28 U.S.C. § 1291. Our standard of review is plenary. *See Watters v. City of Philadelphia*, 55 F.3d 886, 891 (3d Cir.1995).

the organized crime charges, told Keller he could not be associated with the case and left the hearing without testifying.

Later that day, an unidentified law enforcement officer told the DETF Captain, defendant Daniel Rosenstein, that Green had appeared as a character witness for a member of the Stanfa crime organization. Rosenstein ordered Green removed from "street" work and told him there would be an investigation into his possible ties with organized crime. Rosenstein then sent a memorandum to the Housing Authority Police Department's Deputy Chief of Police, defendant John Cresci, recommending such an investigation and requesting Green's temporary transfer to regular patrol duty pending its outcome.

Subsequently, Cresci discussed the matter with the Housing Authority Police Department's Acting Chief of Police, defendant William Bergman. They decided a departmental investigation was unnecessary because it would duplicate the ongoing federal investigation of the Stanfa crime organization, and also because they did not believe Green was affiliated with organized crime. But Cresci and Bergman agreed with Rosenstein that Green should be transferred. On March 31, 1994, Green was formally transferred from the DETF to regular patrol duty.

Green's duties changed as a result of his transfer. As a DETF officer, Green participated in drug raids, made drug related arrests, and was generally responsible for enforcing the drug laws. After the transfer to regular patrol duty, Green was principally assigned to work out of a building's security booth. Green's salary was not

reduced, although he claims his opportunities to work overtime (and consequently to earn overtime pay) decreased.

Green contends his transfer constituted unlawful retaliation for protected First Amendment activity. He brought this action against the Philadelphia Housing Authority, Rosenstein, Cresci and Bergman under: 42 U.S.C. § 1983 for violation of his First Amendment rights to freedom of speech and association; 42 U.S.C. § 1985(2) for violation of his right to be free from retaliation for his appearance as a witness in federal court; and the Pennsylvania Constitution for deprivation of reputation without due process of law.

At trial, defendants Bergman and Cresci testified they had no information or even suspicion Green was involved with organized crime,[2] but that his transfer was nonetheless justified. They explained Green was transferred "in case there was anything where [the Housing Authority Police Department] might be embarrassed . . . " and because it "was right for the organization." (J.A. at 122, 164.) In their brief on appeal, defendants maintain they transferred Green out of their concern that the appearance of his ties to organized crime would "bring[ ] . . . discredit upon the image of the [Housing Authority Police Department], [and] endanger[ ] the plaintiff." (Appellee's Br. at 10.)[3]

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[2] Bergman also testified that, if he had any such suspicion, he would have fired Green instead of merely transferring him.

[3] As far as we know, Green has not been reinstated to DETF duty. At trial, Cresci and Bergman testified that Green may be reinstated after the close of the Stanfa trial. Rosenstein testified

At the close of evidence at trial, the district court granted defendants' Rule 50 motion for judgment as a matter of law on all claims. Green brought this appeal. In reviewing the district court's judgment, we must determine whether "viewing all the evidence which has been tendered and should have been admitted in the light most favorable to the party opposing the motion, no jury could decide in that party's favor." *Watters v. City of Philadelphia*, 55 F.3d 886, 891 (3d Cir.1995) (quoting *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir.1993)).

II. Discussion

A. Section 1983 (First Amendment)

On appeal Green contends his First Amendment right to free speech was violated because he was transferred in retaliation for his appearance as a character witness at Keller's bail hearing. A public employee's claim of retaliation for engaging in a protected activity is analyzed under a three-step process. *See Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir.1996); *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3d Cir.1995); *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1270 (3d Cir.1994). A plaintiff must first demonstrate the activity in question was protected. Second, the plaintiff must show the protected activity was a substantial or motivating factor in the alleged retaliatory action. *See Swineford*, 15 F.3d at 1270. Finally, defendants

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somewhat differently, stating that Green's reinstatement turned on whether the Housing Authority Police Department found him innocent of wrongdoing. Green testified that Cresci told him his transfer was permanent.

may defeat plaintiff's claim by demonstrating "that the same action would have been taken even in the absence of the protected conduct." *Id.* The district court did not reach the last two factors because it resolved the first factor in defendants' favor as a matter of law. Accordingly, our discussion will focus on the first step, whether Green's appearance in court was a protected activity.

To qualify as a protected activity, Green's court appearance must satisfy the *Pickering* balancing test. *See Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). First, the court appearance must constitute "speech . . . on a matter of public concern." *Watters*, 55 F.3d at 892. Second, the public interest favoring his expression "must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees." *Id. See also Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35 ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); *Versarge v. Township of Clinton N.J.*, 984 F.2d 1359, 1366 (3d Cir.1993) ("On plaintiff's side of the balance, we must . . . consider the interests of the public in plaintiff's speech."). Determining whether Green's appearance is protected activity under *Pickering* is an issue of law for the court to decide. *See Waters v. Churchill*, 511 U.S. 661, ___, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994).

1. A Matter of Public Concern

Initially we must determine whether Green's appearance as a character witness is a matter of public concern. *See Swineford*, 15 F.3d at 1270-72. We have held a public employee's appearance as a witness, even in the absence of actual testimony, is "speech" under *Pickering*. *Pro*, 81 F.3d at 1291. A public employee's speech involves a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); *see also Watters*, 55 F.3d at 892; *Versarge*, 984 F.2d at 1364. This determination turns on the content, form and context of the public employee's speech. *See Watters*, 55 F.3d at 892.[4] The district court held Green's court appearance was a matter of public concern. We agree.

In *Pro v. Donatucci*, we recognized that a public employee's court appearance in response to a subpoena is

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[4] In *Holder v. City of Allentown*, 987 F.2d 188 (3d Cir.1993), we explained:

> The content of the speech may help to characterize it as relating to a matter of social or political concern of the community if, for example, the speaker seeks to 'bring to light actual or potential wrongdoing or breach of public trust' on the part of government officials. The form and context of the speech may help to characterize it as relating to a matter of social or political concern to the community if, for example, the forum where the speech activity takes place is not confined merely to the public office where the speaker is employed.

Id. at 195 (citations omitted).

a matter of public concern. 81 F.3d at 1291. The plaintiff in that case, Sisinia Pro, was subpoenaed by her employer's wife to appear as a witness at her employer's divorce proceedings. Pro appeared at the hearing but was never called to testify. She was fired shortly thereafter. Pro brought suit against her employer under 42 U.S.C. § 1983, claiming he fired her in retaliation for protected activity. We found that Pro had a First Amendment right to appear in court despite the fact that the content of her speech was "purely private," because the form and context of her speech was of public concern, i.e. an appearance to deliver sworn testimony before an adjudicatory body. In explaining our holding, we stated, "[T]he public employee's interest in responding to a subpoena and the judicial interest in having state employees respond to subpoenas without fear of employer reprisal justify our ruling. Moreover, . . . there is no 'practical distinction between retaliation on the basis of a public employee's actual testimony and the retaliation that Pro alleges.' " *Id.* (quoting *Pro v. Donatucci*, No. 94-CV-6001, 1995 WL 552980, at *4 n. 3 (E.D.Pa. Sept.18, 1995)).

We declined to rule in *Pro* whether a public employee's voluntary appearance in court, not under subpoena, would be a matter of public concern. *See id.* at 1291 n. 3. That is one of the issues facing us here, and it merits some discussion.

Although in practical terms it may be inconsequential whether a witness has been subpoenaed (one can "volunteer" to receive a subpoena), there would appear to be a conceptual distinction that turns on a witness's will or

desire to testify, especially in this context where the witness is a law enforcement officer. It should matter, therefore, whether a police officer chooses to interject himself into a bail hearing, which is an adversary proceeding, as a character witness for a defendant. On the other hand, there is a compelling reason to find Green's appearance to be a matter of public concern regardless of its voluntary nature. That reason, of course, is the integrity of the truth seeking process.

For guidance we will turn, as we did in *Pro*, to a line of cases from the Court of Appeals for the Fifth Circuit holding a public employee's truthful testimony, even if voluntary, is inherently a matter of public concern protected by the First Amendment. *See id.* at 1288 (citing *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100-01 (5th Cir.1987); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir.1989), *cert. denied*, 493 U.S. 1019, 110 S.Ct. 718, 107 L.Ed.2d 738 (1990)). As the Fifth Circuit observed, "When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern. Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth. We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state." *Johnston*, 869 F.2d at 1578 (quotations and citations omitted); *see also Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir.1982) ("[T]he first amendment protects the right to testify truthfully at trial.").

Identical concerns are implicated by Green's voluntary appearance at Keller's bail hearing, where the court depends upon accurate testimony by those familiar with the defendant in order to determine whether the defendant is likely to flee or endanger the community. *See* 18 U.S.C. § 3142 (judicial officer must release defendant on bail unless such release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."). The utility of uninhibited testimony and the integrity of the judicial process would be damaged if we were to permit unchecked retaliation for appearance and truthful testimony at such proceedings. Not only would "the first amendment right of the witness be infringed by this type of coercion, the judicial interest in attempting to resolve disputes by arriving at the truth would be in jeopardy. Furthermore, a witness who succumbed to any real or imagined coercion could also be subject to a charge of perjury." *Reeves*, 828 F.2d at 1100.

In *Pro*, we held the context of a courtroom appearance raises speech to a level of public concern, regardless of its content. *Pro*, 81 F.3d at 1291; *see also Johnston*, 869 F.2d at 1578 ("The goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in these contexts speech 'of public concern.' "); *Reeves*, 828 F.2d at 1100 (holding sworn subpoenaed testimony is matter of public concern, even though the content of the testimony "did not concern the type of political speech which lies at the core of first amendment freedoms"); *Langley v. Adams County, Colo.*, 987 F.2d 1473, 1479 (10th Cir.1993) ("The

law is clearly established that the 'First Amendment protects the right to testify truthfully at trial.' "). *But see Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir.1994) (declining to adopt Fifth Circuit analysis); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir.1988) (emphasizing the importance of content over context). We can discern no reason why a voluntary appearance would eliminate the public interest. Therefore, we hold that Green's voluntary appearance as a character witness is a matter of public concern.[5]

2. Balance of Interests

The question remains whether Green's free speech interest in testifying as a character witness is outweighed by any injury the speech could cause to the interests of the Housing Authority Police Department as employer.

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[5] Judge Roth would note that had this Court not held in *Pro v. Donatucci*, 81 F.3d at 1288-91, that a public employee's potential sworn testimony before an adjudicatory body was a matter of public concern and protected by the First Amendment, she would dissent on the issue of whether the public employee's actions here were a matter of public concern. She dissented in *Pro* on the basis that compliance with a subpoena is not speech. She does not, however, believe that she can distinguish the present case from *Pro* on the sole basis that here the public employee had not been subpoenaed. Were *Pro* not precedent, she would disagree with the panel that a non-subpoenaed appearance by a public employee, much less than a subpoenaed appearance, is a matter of public concern. She would nevertheless concur in the ultimate conclusion that, due to their potential disruptive impact, the actions here were not protected speech.

See Waters, 511 U.S. at ___, 114 S.Ct. at 1884; *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35; *Swineford*, 15 F.3d at 1272. If Green's court appearance could potentially disrupt the work of the Housing Authority Police Department, and this potential for injury outweighs the public's interest in Green's speech, then judgment for the defendants is proper. *See Waters*, 511 U.S. at ___, 114 S.Ct. at 1890 (weighing First Amendment "value" of speech against "the potential disruptiveness of the speech"). The district court granted the Housing Authority judgment as a matter of law, finding Green's appearance injured the DETF's interests in minimizing departmental disruption and maintaining an environment of trust and security.

Normally, this balancing test would be an issue of fact and would remain in the hands of the fact finder. But where the presence of factual disputes would normally preclude the court from ruling as a matter of law, Supreme Court precedent requires the trial court to do so. "Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests. . . . [Courts] are compelled to examine for [them]selves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect." *Connick*, 461 U.S. at 150 & n. 10, 103 S.Ct. at 1692 & n. 10 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031-32, 90 L.Ed. 1295 (1946)).

In weighing the competing interests, we begin with the proposition that all court appearances are matters of public concern. That is so because all court appearances implicate the public's interest in the integrity of the truth

seeking process and the effective administration of justice. But at the same time, it would appear that the strength of the public's interest can vary based on the nature of the court appearance. *See Pro*, 81 F.3d at 1291 n. 4 ("We have not held that courtroom testimony should receive 'absolute' First Amendment protection.")

It is of some moment, therefore, that Green appeared voluntarily, not in response to a subpoena. As we have held, a voluntary court appearance is a matter of public concern. We encourage voluntary testimony so that parties and courts have access to all available information and witnesses. But the public interest favoring subpoenaed testimony is even stronger. It implicates not only the integrity of the truth seeking process and the effective administration of justice, but also the public's interest in protecting court-ordered conduct. *See id.* at 1290 ("A subpoenaed witness has no choice but to appear at a trial, unless he is willing to risk a finding of contempt.") (quoting *Pro v. Donatucci*, No. 94-CV-6001, 1995 WL 552980, at *13-14 (E.D.Pa. Sept.18, 1995)). As Green appeared voluntarily, it would seem that the public's interest in his court appearance is somewhat more limited than it would be if his appearance were subpoenaed.

Nor do we find it significant that Green appeared as a witness at a bail hearing as opposed to a trial. Reputation testimony is probative in either. In addition, while some commentators have implied that character testimony is less important than fact testimony,[6] we believe

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[6] *See, e.g., McCormick on Evidence* 549 (Edward W. Cleary ed.) (3d ed. 1984) ("[I]n many situations, the probative value [of

no distinction should be made between character and fact testimony for *Pickering* purposes. Both are essential to the truth seeking process.[7]

In comparison, the interests of the Housing Authority Police Department as employer are very significant. They include successfully fighting drugs and crime, protecting the safety of its officers and other members of the community, fostering trust and confidence among its officers and between its officers and other law enforcement drug units, and protecting the Housing Authority Police Department's reputation. As defendants state in their brief on appeal, they were concerned "that the plaintiff's voluntary appearance, as a narcotics officer, at a bail hearing on behalf of a reputed organized crime associate would bring discredit upon the [Housing Authority Police Department], endanger the plaintiff and tarnish the image of the [Housing Authority Police Department]

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character evidence] is slight and the potential for prejudice large.").

[7] *See, e.g., United States v. Logan*, 717 F.2d 84, 87-93 (3d Cir.1983) (discussing the importance of character testimony, and recommending a jury instruction that, "[w]here a defendant has offered evidence of good general reputation for truth and veracity, . . . the jury should consider such evidence along with all the other evidence in the case" and that "[e]vidence of a [criminal] defendant's reputation . . . may give rise to a reasonable doubt"); *see also* Committee on Model Crim. Jury Instructions Within the 8th Cir., Manual of Model Crim. Jury Instructions for the District Courts of the 8th Cir. 89 (1994) (some circuits now favor a jury instruction that character evidence should be considered together with all other evidence in a case; the "standing alone" charge is seen as an unwarranted invasion of the jury's special function in deciding what weight to give any particular item of evidence.).

in the eyes of the residents of public housing the department serves. . . . " (Appellee's Br. at 5.) These interests merit substantial protection, and any risk of departmental injury or disruption weighs heavily under the *Pickering* balancing test.

We agree with the district court that there was a risk of departmental injury based on the "potential disruptiveness of the speech." *Waters*, 511 U.S. at ___, 114 S.Ct. at 1890. First, an unnamed police officer telephoned Rosenstein to report Green's appearance at Keller's hearing. Second, Green testified at trial he heard comments from co-workers and friends that "[g]uys wouldn't want to work with me because they were afraid that I knew people in the mob. . . . " (J.A. at 59.) Finally, because of the nature of DETF work, any perceived breach of trust and security could reasonably constitute a threat to the DETF, its officers and its relationships with other police drug units and the community it serves. This risk of injury to the Housing Authority Police Department outweighs the public interest favoring Green's speech. Judgment as a matter of law for defendants is proper under *Pickering*.

Green argues he should not be held responsible for creating the potential disruption because he followed departmental procedures and testified only after receiving express permission from his superiors. But a public employee in a sensitive position like Green cannot turn a blind eye to the possible consequences of his voluntary testimony. The responsibility must lie with Green to investigate the nature of the criminal charges, and to bear

any risks associated with his voluntary court appearance.[8]

Green also claims that the Housing Authority Police Department's reasons for his transfer were pretextual, i.e. that the potential for departmental disruption was not the true cause for his transfer. But the test in *Waters* is an objective one for "potential disruptiveness." *Waters*, 511 U.S. at ___, 114 S.Ct. at 1890; *see also Watters*, 55 F.3d at 896. Therefore any pretext is irrelevant to our weighing analysis.

The second step in the *Pickering* analysis, whether the protected activity was a substantial or motivating factor in the transfer decision, would be a factual issue for the jury. But under *Pickering* we do not reach this step. Nor do we reach the third step in the analysis, whether defendants would have transferred Green even in the absence of his speech. Therefore we will affirm the district court.

3. Conclusion

Implicit in Green's claims is the notion his transfer was unfair under the circumstances. Green voluntarily chose to testify as a character witness for the son of a friend. He followed the applicable rules and received permission to testify, although neither the Housing

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[8] Nor do we believe this case raises questions of equitable estoppel. For example, if Green had been granted permission to testify after advising his supervisors that Keller was an organized crime associate, the Housing Authority Police Department might well be estopped from imposing sanctions.

Authority Police Department nor he knew of the organized crime association. He appeared at the bail hearing, but when he realized the nature of the charges facing Keller and his association with organized crime, he left the hearing without testifying. His superiors testified they do not believe he has any association with organized crime and, in fact, if they had, Green would have been fired.

Nonetheless, the Housing Authority Police Department contends Green's actions were potentially disruptive to the proper functioning of the department. Whether there is potential disruption is an issue of law for the court. We have found there was a likelihood of disruption and that it outweighs the interests favoring the protected activity.

Had Green been fired instead of reassigned, the penalty would have appeared especially severe in view of his supervisors' belief that he had no association with organized crime. It may be argued, therefore, that the degree of harm should be factored into the test. But if the proper standard is the potential for disruption, it is difficult to see how the extent of harm can be taken into account.

Of course, different facts can change the calculus. In weighing the protected interest against the likelihood of disruption, it is especially significant that a law enforcement officer whose primary duty is to fight drugs appeared in court as a character witness for a defendant who was part of an organization well known for its involvement in the drug trade. The correlation could not be more direct nor more damaging to the Housing Authority Police Department's

role. A more oblique correspondence might well yield a different result under the weighing process.

B. Section 1985(2)

Green also brought a claim under 42 U.S.C. § 1985(2), alleging defendants illegally conspired to transfer him in retaliation for his appearance as a character witness in federal court. But, as we have held, defendants' transfer of Green was not unlawful. For the reasons we have stated and for those given by the district court, we hold the dismissal of Green's § 1985(2) claim was proper.

C. State Constitution

Green also sued defendants under the Pennsylvania Constitution for deprivation of reputation without due process. The district court rejected Green's deprivation of reputation claim as a matter of law because Green could not establish a causal connection between his reputation injury and the defendants' conduct. We agree this claim was properly dismissed.

III. Conclusion

For these reasons we will affirm the judgment of the district court.[9]

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[9] In light of our decision to uphold the district court's dismissal of Green's claims, there is no need to discuss the other issues on appeal: whether the trial court erred in excluding certain evidence of harm to plaintiff's reputation and in ruling that punitive damages could not be awarded.

APPENDIX B

Filed March 13, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1908

DONALD GREEN,

Appellant

v.

PHILADELPHIA HOUSING AUTHORITY; WILLIAM BERGMAN, INTERIM CHIEF OF POLICE; DANIEL ROSENSTEIN, CAPTAIN; JOHN CRESCI, DEPUTY CHIEF, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS OFFICIALS OF THE PHILADELPHIA HOUSING AUTHORITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv-02885)

Argued June 12, 1996

Before: SCIRICA and ROTH, *Circuit Judges* and RESTANI, *Judge*, Court of International Trade*

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* The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed January 31, 1997, be amended as follows:

1. Page 13, line 8: Delete the last sentence of the paragraph and substitute in its place, "Therefore under the facts of this case any pretext is irrelevant."

2. By signaling footnote 9 at the end of the first full paragraph on page 13, line 9 (after the word "irrelevant."), and inserting the following footnote:

> 9. A pretextual argument is appropriate when there is a question whether an employee was penalized because of the challenged speech or for some other reason, or when there is a question whether the employer held an "erroneous and unreasonable belief about what plaintiff said." *Waters*, 114 S. Ct. at 1889. The Supreme Court remanded in *Waters* because there was a "question whether Churchill was actually fired because of those statements, or because of something else." *Id.* But this is not at issue here. It is undisputed that Green was transferred because of his "statements," not for some other reason. Nor is there a dispute the Philadelphia Housing Authority Police Department reasonably believed that Green appeared at the bail hearing.

3. Renumber all subsequent footnotes.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

DATED: March 13, 1997

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1908

DONALD GREEN,

Appellant

v.

PHILADELPHIA HOUSING AUTHORITY;
WILLIAM BERGMAN, INTERIM CHIEF OF POLICE;
DANIEL ROSENSTEIN, CAPTAIN; JOHN CRESCI,
DEPUTY CHIEF, IN THEIR INDIVIDUAL AND
OFFICIAL CAPACITIES AS OFFICIALS OF THE
PHILADELPHIA HOUSING AUTHORITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv-02885)

Present: Scirica and Roth, *Circuit Judges*, and Restani, *Judge*, Court of International Trade*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 12, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 19, 1995, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

RECEIVED AND FILED
1/31/97

Dated: JAN 31 1997

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1908

DONALD GREEN,

Appellant

v.

PHILADELPHIA HOUSING AUTHORITY;
WILLIAM BERGMAN, INTERIM CHIEF OF POLICE;
DANIEL ROSENSTEIN, CAPTAIN; JOHN CRESCI,
DEPUTY CHIEF, IN THEIR INDIVIDUAL AND
OFFICIAL CAPACITIES AS OFFICIALS OF THE
PHILADELPHIA HOUSING AUTHORITY

(D.C. Civ. No. 94-cv-02885)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS and McKEE, *Circuit Judges*, and
RESTANI, *Judge*, Court of International Trade*

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* The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

Circuit Judge

Dated: MAR 13 1997

APPENDIX E

* * *

[p. 3] THE COURT: You may be seated, counsel.

Present before the Court, in Civil Action No. 94-2885, Donald Green v. Philadelphia Housing Authority, interim Chief of Police William Bergman, Daniel Rosenstein, Deputy Chief John Cresci, in their individual and official capacities as officials of the Philadelphia Housing Authority.

Plaintiff has brought this civil action seeking a variety of relief under 42 United States Code, Section 1983, 1985, Section 2, 1986; the Court has jurisdiction and the plaintiff has invoked the supplemental jurisdiction of the Court in respect to state claims.

The Court has convened a jury and the jury has heard the testimony from the plaintiff and the testimony from the defendants. The evidence is completed, and the Court has before it motions under Rule 50 to enter judgment as a matter of law.

The Court is going to enter those judgments. The Court will enter judgments as a matter of law for defendants. I'll explain my reasons at this time.

A very general recitation of the pertinent facts at this time are that the plaintiff became a member of the Philadelphia Housing [p. 4] Authority police force. Prior to that he had been a truck operator, he took training and became a member of the police force and has been there for a few years, since 1991, I believe. He was a member and apparently he had some injury in 1993 for some months. He then returned on a regular patrol and then in

the middle of February of 1994, which is the center of this dispute, he became a member of the Drug Elimination Task Force, within the Philadelphia Housing Authority and he served there for approximately a few weeks, until in March, 1994, when these events took place, he was called by a friend, a Mr. Keller to see if he could testify as a character witness in support of Herbert Keller, who the plaintiff testified he believed was to be considered for bail privileges. And the plaintiff was asked to appear at that bail hearing and testify as a character witness.

The plaintiff on the appointed day did appear, this is a Wednesday, and before he did, he did in keeping with the regulations or the policy or the practices of the Authority, of the police department, he did check with his superior, his sergeant, and told him about it and there was some discussion about it, the content of what presumably [p. 5] Keller was charged with.

In any event, the sergeant gave the plaintiff permission to appear, provided he did so and I don't recall if it was his lunch hour or his own time. The only reason I say that is because oftentimes persons that work on shifts like the plaintiff does, what normal people think of as noon for lunch might be 5 o'clock lunchtime, could be misleading, if it meant noon.

The plaintiff said he received a beeper call about 10 o'clock. The attorney told him to come up. He came up in plainclothes and he appeared in the courtroom before a Magistrate Judge. I believe they usually take bail hearings and he was there and a number of persons were identified.

The plaintiff identified himself in his plainclothes as a member of the Philadelphia Housing Authority Police Department and said he was present to be a character witness.

There was no testimony taken as such, he was identified, no testimony. The plaintiff I think said he was sitting next to Mr. Keller. Then they sat down and the charges were read in the indictment. And the indictment apparently is criminal number 94-127, United States versus Stanfa, [p. 6] et al. It. is presently being tried, coincidentally enough, in the room next to this room before Judge Buckwalter. And, Herbert Keller is over there as of this moment as a defendant.

In any event, when the charges were read, the plaintiff listening to the charges understood from the charges that Mr. Herbert Keller, contrary to what he was told, was apparently not just in the company of somebody involved in bookmaking, but indeed was presumably a named defendant in a major indictment, charging serious crimes against Mr. Stanfa, Mr. Keller and there are a number, 14 or 15, I forget, a number of persons, that involved racketeering, extortion and other crimes.

When hearing about that, the plaintiff immediately told Mr. Keller that he did not think he could testify for Herbert Keller, that's my understanding of it. He then left. He didn't know then what happened. The proceedings presumably went on, and on they went.

Now, my remembrance of the evidence is that Mr. Green found himself back at the PHA place where he worked, this was about 6 p.m., I believe that same day.

Apparently during the intervening time, [p. 7] someone had called the PHA, an Assistant United States Attorney or law enforcement official, and inquired whether or not there was an Officer Green with the PHA because that caller stated that a person named Green had showed up at this hearing and was a police officer. He said he was prepared to be a character witness for Mr. Keller at least for purposes of bail.

The PHA people, Captain Rosenstein confirmed that the plaintiff here was the Mr. Green that appeared. Now that same day Captain Rosenstein approached Mr. Green and they had a conversation and Captain Rosenstein said he was going to assign forthwith Mr. Green to a desk job for five days until the question was cleared up or words to that effect.

There is exhibited an exhibit in evidence where Captain Rosenstein issued a memorandum, he requested of his superiors. So we have the rank here – Captain Rosenstein was the commander of the DETF unit and his superiors were Deputy Cresci and Bergman, in that order.

In any event, Rosenstein's memorandum suggested to his superiors, Cresci and Bergman, that there should be an investigation about this to clear [p. 8] it up.

Cresci and Bergman discussed the matter. This all took place in two or three days, it is not entirely clear, Thursday or Friday these decisions were brought out. The outcome was that Bergman and Cresci, being Rosenstein's superiors, decided there did not have to be a Philadelphia Housing Authority investigation. Their view was that the transfer or reassignment should stay in place until the investigation was completed. And that's a little

vague about what that means. We will get to that a little later but it was their view that they would learn presumably from state, federal or other authorities maybe the extent for which Officer Green may have some relationship with Mr. Keller, that would be a factor that PHA people should be considering, relative to Mr. Green's role as a police officer.

Now, there are some other facts that we will get to but generally speaking that's my understanding of the facts. For example, we will get later to Rosenstein's testimony about waiting for the federal litigation to be completed, focused on in his cross-examination on the civil suit, and there's testimony of Cresci and Bergman that [p. 9] suggests that their view was information could be coming from federal and other authorities who already presumably were investigating persons involved, such as Mr. Keller in the Stanfa criminal federal litigation.

With that background in mind, the plaintiff has brought this action and claims that there is some protected conduct here by him that was violated under the federal statutes, individually by these defendants, by the municipality under Monell principles, and also in conspiracy circumstances under 1985, Section 2, and also under a free speech feature of the state law.

The first question the Court has to come to grips with is what actually is the protected activity. I'm not entirely sure the Court disagrees with the plaintiff, I think this came out in the attorney's arguments. But it becomes important for us to assess that because of some other principles that come into play here.

I think there are several things that are clear, there's no dispute about. Number one, none of the defendants ever prevented the plaintiff from testifying anywhere. I think they imposed reasonable conditions. I say reasonable, he had to [p. 10] go on his own time, in plainclothes. This is not the kind of infringement to be intimidating or infringing on one's right of free speech. But, other than those conditions, there were no other efforts or attempts and in some of the cases there are discouragements relative to the relationship of the employer with superiors to testify. And, coupled with that is the notion that it is well recognized that persons who appear in court and are called upon to take the witness stand and to take an oath are protected in furnishing truthful testimony. There is no evidence that the defendants interfered with either of those rights.

What the plaintiff's circumstance here is not so much that he appeared and identified himself as in terms of expressing a right to express himself, but it seemed to the Court that the content of what he testified about is something that triggers in the Court's view a Pickering v. Board of Education analysis suggested by the Supreme Court, 391 U.S. 563, and required, indeed, by the lower courts. There have been a number of cases, and both counsel gave me cases that touch upon that. What we are talking about here that comes to the fore in this case is the Pickering balance, that is, this is [p. 11] a question of law for the Court, not for the jury, and the question is balancing the speaker's interests, in Mr. Green's interests, to express himself or at least not to be retaliated against for appearing and speaking, versus the governmental interest in promoting the effectiveness and the sufficiency of

the services that the agency for which the speaker works performs allowing that efficiency continues to be achieved.

The plaintiff's interest here was either free speech to testify in federal court or to associate or to appear and say he would testify. That's what actually happened here, he was not called to the witness stand to testify.

So, while that doesn't seem to be necessarily important from the vantage point of the protected right, it becomes very important with respect to certain other issues of the case and particularly with respect to the issue of qualified immunity.

But, in any event, the plaintiff's interests here, whether free speech, appearing in court and being prepared to testify, or whether it is his right to associate with whomever or whatever groups or interests he has, are protected interests [p. 12] and that's what is weighed in a Pickering v. Board of Education balance here.

Now, there's testimony here from the plaintiff and the plaintiff's witnesses and the other evidence as well, and I don't think there is disagreement, about the manner in which the PHA Police Department has an interest in advancing the efficiency and the effectiveness of its work. There is testimony that the force consists of approximately 200 persons or so; 20 percent of whom are assigned either to this DETF group, which has maybe 20 or 25 persons, and there is a tactical group too. I think there was a time in 1992, the plaintiff testified he was associated with the tactical unit. But the other 150 or 160 persons on the police force are – well, there's some supervisors and the like – but, the bulk, probably 150 or so, are

what they call on patrol duty. Patrol duty apparently consists of sitting in, what the testimony has been, sitting in a booth or at a presumed protected location, a lobby or the like, and checking the ID of persons coming in and coming out and being on the premises. This duty has been testified to as something that does not involve usually a lot of police activity in the normal [p. 13] sense, arrests, searches and the like. Occasionally it does and officers that do that are paid the same. Patrol officers and DETF officers have the same conditions of employment in regard to benefits and the like, including their weapons, what they carry, their authority to use them, and the uniform and the like, and even though patrol officers are in, if you will, in full regalia and have the full authority of a police officer, patrol work normally does not bring about a lot of arrest activity.

Normally those persons, presumably on foot patrol and in booths, function alone and they work on shifts within the various properties in the city managed by the Philadelphia Housing Authority and there are a number of those. There could be some activity in a patrol car but that's of a lesser degree than foot patrol or booth work.

The DETF is a group that has as its principal focus the elimination of drug activity in the public housing setting. And, that's led by, in this instance, Captain Rosenstein and these 20 or 25 or so persons. The plaintiff was in this group for about five weeks. He liked it better than the other duty. One of his complaints here is that he was transferred from something he likes better to patrol [p. 14] work.

During the time that he was in the DETF, he participated in, were six arrests. On one occasion, two persons were arrested and the other occasion, one person was arrested. On those occasions he worked with a partner, Officer Muller or Mullen. I don't have the spelling in front of me. The record will show what it is. He participated with him in those arrests. It is that role that he was in on the day he came up to federal court, as a member of the DETF.

There is no evidence that the DETF unit has any other special privileges or any other enhanced rating or ranking within the collective bargaining agreement. There is an agreement between the officers and the PHA, where the rights and the obligations of the officers, as well as the Authority are set forth. And the agreement governs the terms and the conditions of employment, including compensation and benefits, and there is a grievance procedure and a collective bargaining procedure between management and labor. But there is nothing to indicate either in the testimony or in the agreement that there is any special standing that a person in DETF has to either enhance his [p. 15] rank, salary or compensation or his duties or opportunities for advancement. The pay is the same, the uniform is the same, and the collective bargaining agreement does allow PHA to assign and reassign duties among all the officers. I think Mr. Rudovsky said he understands the notion, and the Court agrees with Mr. Rudovsky, that a transfer can be made for any reason, but not for an unlawful reason.

So, in this circumstance, the Pickering balance comes before the Court, and the Court begins with the notion, as I have explained it, that what happened here by the

plaintiff does, for purposes of the Court's ruling, involve a matter that is protected.

The Court believes that there is evidence from the plaintiff and his witnesses or certainly Officer Young, who is head of the union, that close working relationships are essential and confidence and trust among officers are important in fulfilling their duties. And in the DETF, where the officers presumably, according to the testimony, do work, at least, if not all the time, certainly sometime, making arrests in groups or in pairs, it becomes – possibly maybe not in every instance, but in many [p. 16] instances we have heard about – more acute, and that the police department gives consideration to the existence of the need for trust, confidence with officers working together, with each other.

The Court believes that the Third Circuit law is that a public body need not wait to see whether or not that relationship would become disruptive or deteriorate before it acts. It has the right, if it has the basis to think that it could happen, to proceed in advance of any disruption. See Versarge v. Township of Clinton, 984 F. 2d, 1359, 1366 (3d Cir. 1993).

That case involved a voluntary fireman who worked for a fire company and made some statements presumably critical of the officials of the fire company and the fire company premises, having to do with building code violations and the like. And in a Pickering type of balance, the Court held that the officials were permitted to act in advance of any disruption that could be caused by a person like that not functioning with other fire fighters and the like.

The Court wants to make it plain though, that a so-called lateral transfer with no change in benefits, salary, compensation and the like can be a [p. 17] violation. In other words, the determinative fact is not whether or not there is a reduction in grade, salary or benefits or employment opportunity or advancement.

I think plaintiffs have offered McGill v. Board of Education, 602 F. 2d 774, to support that notion. In McGill, a school teacher was complaining at a public meeting. The case speaks for itself. As a general proposition, she was complaining about working conditions and officials associated with the management of the school system, the Board and the like, and she made her views known. She was then transferred to another school, and it was held that her transfer was a retaliation for her remarks that took place in the school premises, either in the lounge or in the school Board meetings.

Plaintiff says here that because he appeared in this courthouse and because he identified himself as someone who was prepared to speak to the good character of Herbert Keller, he was retaliated against. I think in the "retaliation" context, what we are thinking about is the conduct that results in like an eye for an eye, or evil for evil situation.

I think the plaintiff says that the PHA [p. 18] perceived his appearance as being a wrong in some way and punished him and transferred him and that's his view of it. So, that's where the notion of retaliation would come into play. I'm looking at it from the plaintiff's viewpoint here, retaliation for the exercise of free speech as is suggested in the McGill case.

In the Melton v. City of Oklahoma case, 879 F.2d 706 (10th Cir. 1989), suggested to us by plaintiffs, a police officer was discharged for testifying at a court proceeding, under oath in a criminal case for a public official. The court in Melton covers the same ground that we are covering here, that the testimony was about a matter of public concern. The law is that if it has to do with a public employer, the Pickering analysis must be made, and also the question of qualified immunity comes into play.

In Ziccarelli, 767 F. Supp., 1450 (N.D. ILL. 1991), a prison guard was discharged because he went and testified for a friend in a court proceeding, under oath, in regard to the issue of whether the death penalty should be imposed. When his employer learned about that, he was discharged for testifying.

[p. 19] The defendants offered no evidence in that case of any sort of Pickering evidence that there was an interest in promoting the efficiency or the effectiveness or functioning of the public body in their act of discharging Ziccarelli. It seems here, certainly with Captain Rosenstein, that when he acted on the same day when he received the call, and brought about an immediate five day, or several day transfer, pending internal investigation, that the Pickering balance weighs very heavily in his balance. Later, he was oresumably precluded from changing the transfer because of orders from his superiors but there doesn't seem to be any question that as the Captain of that unit, who has police officers working closely together, he could be generally concerned about, if not the real, the perceived, need to maintain, or not have

deteriorate the confidence, strength, reliability of the department.

I think at this juncture it is important to note that none of the evidence offered by the defendant suggests that the defendants have any negative feelings about the plaintiff. I think Captain Rosenstein stated it probably better than the others, that the plaintiff was nothing other [p. 20] than a good patrol officer, good police officer, now a good patrol officer. At the time he worked for Cresci, a good DETF officer. Rosenstein stated he had no hesitation in having Mr. Green returned once the question is resolved one way or the other.

It seems the balance tips clearly in Rosenstein's favor, indeed, in Cresci and Bergman's favor as well. The Court feels there is a pending federal investigation still ongoing, involving Mr. Herbert Keller and the same motivation that Rosenstein has about Mr. Green's functioning with this small unit obtains to them as well.

Now, there has been some talk among the defendants that developed in deposition testimony and then testimony here, and arguments have been made here, that the topic as such has centered around the so-called investigation. I think plaintiff's counsel made the point and I think for good reason, I think counsel is a strong advocate for his client, he had good ground to suggest where is the investigation; why aren't they doing it? I think it is appropriate for the Court to respond to that.

This isn't exactly a litmus test circumstance of a right angle collision. If, for [p. 21] example, a cafeteria worker in a public building or public school was at a meeting where a public topic, a matter of public concern was

being discussed such as medical benefits for employees – that they are inadequate and the like – and that employee was to state in this public meeting that he has had tuberculosis for two years, there wouldn't be any question that the public authorities would have the right to transfer that person under a Pickering analysis to some other service. Until when? Until it is determined whether or not that would interfere with the efficiency or the effectiveness of the public body's work. It could be that a prompt investigation could solve that question one way or the other. There might be some questions as to who were the persons he associated with at the time he had tuberculosis, if he or she had it. Sometimes those investigations can result in a relatively prompt resolution and sometimes they never do.

The difficulty with this, this is like saying I'm a friend of the Ku Klux Klan. How do you investigate that? Well, next Monday we will investigate that, we will find out by Thursday if it is true or not and then take appropriate action. I think the Court can take judicial notice that the [p. 22] functioning of organized crime groups over the years, it has now been disclosed – it is not in dispute – is widespread, and it's activities are usually very, very secretive or certainly misleading. Certainly supported by lies and distrust, concealments and I'm only mentioning this to touch on the issue of why haven't they investigated? It seems to me that the investigation may never answer the question. It just may never do it, no matter how genuine everyone is. In Mr. Green's position, as he has expressed it, these public officials are not required to accept that. And that it seems to me at least in a Pickering circumstance, tilts the balance to the need to

take reasonable, moderate measured steps that are not punitive, that have to do with important value judgments concerning officers working together.

The notion that when this criminal verdict comes in there will be some revelation about the concern facing the public official is quite frankly somewhat misleading. The federal authorities for good reason may never tell the PHA for some reason. I'm mentioning this, I think it has to be addressed, if there is some suggestion in the claims here, that through negligence or carelessness [p. 23] they permitted this to go forward, I'm not sure it has been proven, I'm not sure there is enough evidence for inference, it could be prone, – I don't think the plaintiff is capable of proving it, I think the plaintiff probably said all he can. The difficulty with the plaintiff's circumstance here, he is simply, for whatever reason, acknowledged he has an acquaintance and we heard that on the record, that is sufficiently close, that the public officials could believe that it is a relationship that they think can interfere with their judgment concerning the effectiveness of Mr. Green as a team member on the DETF.

I think the Pickering balance is in the municipality's favor in that regard and it just seems to me that question may be answered, to the satisfaction of the PHA, yet it also may never be answered. But, the fact that it has not been answered has not been shown by the plaintiff to be either purposeful, deliberate or even negligent as far as the public officials are concerned.

There is a question here that has been raised in the affirmative defense of qualified immunity. Before I get to that, I should state that the question of whether or not the

plaintiff's [p. 24] appearance in court was a motivating factor in the transfer decision, while that could be a jury question, if we get to that point, we don't get to that once the Court has determined, as it has, that if this is a protected right, the Court will give the plaintiff the benefit of the doubt in that respect and say that it is, that the Pickering balance is in favor of the government, which is a question for the Court and not the jury.

The defendants have raised the question of qualified immunity. And, that brings into play the notion of whether there is a good faith performance of discretionary duties by public officials and that also is a question of law for the Court to decide.

The question here, that is actually a test, has been expressed a number of ways, but one way is stated as follows: Did the defendant's conduct, this has to do with the reassignment, that's what we are talking about, the reassignment of the plaintiff, violate clearly established constitutional statutory rights that the defendants, as reasonable officials, should have known about?

The Court finds that reasonable officers in the defendants' positions would have thought that [p. 25] they could reassign the plaintiff. Under the circumstances of this case, I am not going to repeat them, but under all the circumstances of this case, including the feature in the collective bargaining agreement that allows transfers for just cause, defendants' actions were reasonable.

The fact that the manner in which the reassignment took place was not, which most of these other cases make clear, was not in a punishment circumstance, is another important feature here.

And, I have already gone over, and won't repeat in detail, the notions about the fact there was no change in his rank or status.

There is no evidence of any kind that any of these defendants said anything to anyone about this transfer, and the reasons for it. There's no evidence of any kind that there was any reprimand, no publication within the police department, in terms of memoranda, in terms of the police population generally. There was no posting of any sort that had any reference to the notion that the plaintiff had appeared in court and that that warranted some sort of transfer.

There's no evidence that any of the defendants said anything to anyone other than to the [p. 26] plaintiff. The plaintiff mentioned that other co-workers, and I think he mentioned his brothers made some comments that he considered a criticism of him as a good police officer, and that they made certain utterings and statements to the effect that they didn't think he was a good police officer, that he couldn't make it, that sort of thing. The evidence is equally balanced, giving the plaintiff the benefit of the doubt, that the negative perceptions could have come, what they did, from what he said and did – initially choosing to appear on behalf of Herbert Keller – as opposed to the fact of reassignment. And, it would be sheer speculation for the jury to say that they think it was caused by things that the defendants said or did.

The manner of transfer and the place he went should also be remembered. He went in the group that represents nearly the entire PHA working police force. He

wasn't in some subgroup or a group with some stigma associated with it.

Now, his own individual preference would be to be in DETF. He has a right to do that. He has no contractual or constitutional right to say where he wants to be contrary to the collective [p. 27] bargaining agreements or contrary to the practices and the customs of the police force.

Now, there's a question here in regard to qualified immunity, as to whether or not reassigning the plaintiff in this way as reasonable persons had believed, was a violation of clearly established law. The Court finds that it was not – that is not the case and there was no clearly established law pertinent to this sort of transfer for these reasons, under these circumstances.

One point was made about discrepancies between Cresci and Bergman's views that they are waiting for the federal criminal investigation, presumably what is taking place here in the federal court and Rosenstein's testimony, that he is waiting for this federal civil litigation to end. He stated in his testimony that he considered that to be the civil trial, that is this trial. I'm not entirely sure there is inconsistency there. It could very well be that Rosenstein was awaiting for evidence to see if that would in his view answer the question that he had and that could have come out in this trial, it may not have and it presumably didn't, but there is nothing wrong for him saying that the federal litigation may be a step toward resolving [p. 28] this question in his mind, there's nothing inconsistent with Cresci and Bergman waiting for the outcome of the criminal trial in which Herb Keller is

presently a defendant. And even, then the Court will repeat the notion, it is not likely that even the conclusion of the criminal trial will resolve the matter, maybe it will and maybe it won't.

The Court finds that the defendants are entitled to the shield of qualified immunity in regard to the reassignment of the plaintiff from DETF to his present assignment on the ground that as reasonable officers in the Philadelphia Housing Authority, a public body, they did not believe that they were violating clearly established law when they transferred him under all of the conditions of this case, which the Court has recited up to this point.

The claim under 1985, Section 2, fails because if the defendants are free of liability individually, they cannot be liable simply because they may have acted together.

Plaintiff's position is set forth in his points for charge, that a conspiracy occurs when two or more cersons reach an understanding to reach an unlawful purpose. The Court ruled that the [p. 29] reassignment was not unlawful. The Court ruled that the defendants are qualifiedly immune and the 1985 Section 2 claim judgment will be entered for the defendants.

The Court believes that also it should address the topic of injury under 1985 Section 2. I'll cover all of these issues so you have a full record of all of these issues, Mr. Rudovsky, in any event as to the principal issue of injury, loss of reputation and loss of overtime.

The Court has already addressed the notion of reputation. The plaintiff has not offered sufficient evidence in the Court's view that the jury could infer any more that

any loss of reputation was caused by the defendant's reassigning the plaintiff than for the plaintiff's own conduct or things he may have said. On the ground that the issue is equally balanced, it will not go to the jury.

In respect to overtime, in the first place there is no contractual right to overtime in the collective bargaining agreement. There's no evidence offered for any sort of reliable pattern of the granting or the withholding of overtime among the police force generally under the collective [p. 30] bargaining agreement, that the jury could develop some sort of reasonable calculation of the plaintiff's claims that he has lost overtime by being on patrol in the patrol section rather than DETF.

As I understand the stipulation as to overtime, it is that there was $4,604.30 overtime for 12 months in 1994, this would include the time that the plaintiff served in DETF. I think I have it straight. I got the transcript. I have to make sure. I invite counsel to correct me, but for nine months of overtime in 1995 the overtime was $3,348.50. In 1995, of course, the plaintiff was in the patrol work.

Now, that is about $380 a month in 1994; $372 in 1995, if I got the mathematics straight, if there is that difference, it is not of constitutional dimension. But, aside from the numbers, the granting or withholding of overtime as a general proposition is so imprecise, so speculative into the future of plaintiff's claims. I think he said he is 33, I think I have it right, 33 years of age. If he stayed with the PHA for another 22 years, he thinks the jury can award him that differential. It is too speculative for the [p. 31] Court to put that to the jury on both the basis

upon which he might be entitled to overtime and factoring in the precise stipulation of the actual experience.

The Court also does not believe, I mentioned this before and ruled out of the case any claim for punitive damages on the ground that there is no evidence of any kind, of any malice or ill will or harm for harm's sake. I'm not suggesting that the plaintiff doesn't feel disappointed, he may feel that way but there has to be evidence that the Court could allow a jury to consider and there no basis for punitive damages.

There's simply no evidence that the defendants thought any less of the plaintiff as a person and as a police officer in terms of his ability and skill that would support the notion that what was done here was either malicious or done for a bad or evil purpose.

Because of the Court's rulings, there can be no Monell liability against the municipality nor liability under the state claim.

The motions for judgment as a matter of law, for the reasons stated, are granted as to all defendants, individual and municipal.

* * *

Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

No. 96-1929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONALD GREEN,

Petitioner,

v.

PHILADELPHIA HOUSING AUTHORITY; WILLIAM BERGMAN, INTERIM CHIEF OF POLICE; DANIEL ROSENSTEIN, CAPTAIN; JOHN CRESCI, DEPUTY CHIEF, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS OFFICIALS OF THE PHILADELPHIA HOUSING AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Contrary to what the petitioner asserts in his petition (Pet. Cert., n. 6 p. 12), the acting chief of police of The Philadelphia Housing Authority Police Department ("PHAPD"), Respondent William Bergman, testified on direct examination during the petitioner's case in chief that it was upon the concern and recommendation of the captain of the PHAPD Drug Elimination Task Force ("DETF") unit that it would be "right for the organization" to remove the petitioner from the DETF unit "until this matter was resolved." Respondent Bergman also testified that DETF was a special unit that worked in conjunction with the Attorney General's Office of Pennsylvania, Pennsylvania State Police, the Philadelphia Police Department, U. S. Customs, the U. S. Drug Enforcement Agency, and sometimes the Federal Bureau of Investigation, "in stamping out large drug operations," such as mob-related criminal activity. He testified that one of the purposes for PHA having a DETF unit was "to work on . . . the image of what the Philadelphia Housing Authority Police Department wanted to become." He testified that PHAPD was looking for "officers that were to some extent more aggressive, to some extent officers that really could *interrelate with other organizations* and *really show these other organizations that this was a police department that was really top notch and [a] very, very good operation.*"

Later, on direct examination during the petitioner's case in chief, Respondent Daniel Rosenstein, PHAPD captain of the DETF unit, testified that the type of officer he was looking for to be a part of the unit was *"[o]ne whose background did not raise questions as to their sincerity and integrity,"* and "[o]ne who obviously was drug free *and did not associate with people in the drug world."* Respondent Rosenstein further testified about the security of operations in the building where the DETF unit was stationed. He explained the necessity to maintain a

secure environment because of, among other reasons, the presence of undercover law enforcement officers from the various law enforcement organizations and informants working together in the building.

Respondent Bergman also testified about his authority to transfer the petitioner. He testified that, under the collective bargaining agreement, management had the authority to direct the work force, including transferring personnel from unit to unit. The collective bargaining agreement, he testified, did not provide for any special status given to persons assigned to a special unit, such as DETF. Nor did the agreement provide for special pay to officers assigned to a unit such as DETF. The testimony and evidence adduced at trial showed that the petitioner's status as a PHAPD police officer did not change as a result of his transfer to patrol duty. He did not lose pay, he continued to wear the uniform of a PHAPD police officer, and he was permitted to continue to perform his duties as a full-fledged police officer.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT BELOW DOES NOT DIRECTLY CONFLICT WITH THE ANALYSIS OF THREE OTHER CIRCUITS OR DISREGARD SETTLED SUPREME COURT PRECEDENT.

In *Waters v. Churchill*, this Court reiterated the longstanding principle of when speech by a government employee is protected by the First Amendment:

> To be protected, the speech must be on a matter of public concern, and the employee's interest in

> expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, *as an employer*, in promoting the efficiency of the public services it performs through its employees.'" [Citations omitted.]

Waters v. Churchill, 511 U. S. 661, 668 (1994) (emphasis added). Determining whether or not a government employee's speech is protected by the First Amendment is a question that must be answered on a case-by-case basis, turning on "the particular context in which the question arises . . . ." *Id.* at 671.

This Court has assumed and continues to assume that "the government must be able to restrict its employees' speech." *Id.* at 672. It is as an employer that governments enjoy far broader powers in restricting speech. Among those reasons is the potential for disruption. As the majority held in *Waters*:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. . . . But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.
>
> . . . [W]here the government is acting as employer, its efficiency concerns should, as we discussed above, be assigned a greater value.

Id. at 675. Government employers should not be fearful of using personnel procedures that differ from the rules of

evidence used by courts; this, the law does not require. *Id.* at 676-677. What the law requires is that the government employer's personnel decision be reasonable. *See Id.* at 677-680 (reasonableness standard discussed).

The Third Circuit's analysis of the petitioner's speech activity followed this Court's holding in *Waters*, as well as *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). To claim that the decision below is "dangerously at odds with *Waters v. Churchill*" is hyperbole. To the contrary, the Third Circuit followed the guidance and principles set forth in *Waters*, keeping within the spirit of this Court's acknowledgment of the complexity in balancing First Amendment activity against a government's interest as employer. The Third Circuit carved out no new analysis when it held that "*under the facts of this case* any pretext is irrelevant." Pet. Cert. App., p. 20a. Rather, in so holding, the Third Circuit explained why pretext was not relevant, correctly relying on this Court's reasoning in *Waters*. Pet. Cert. App., n. 9 p. 20a.

That the Third Circuit's decision directly conflicts with the analysis of three other circuits ignores the *context* component of the *Pickering* balance. This case involved the transfer of a police officer from a special drug elimination unit to a patrol unit, after learning that the officer had appeared on behalf of a reputed associate of the so-called Stanfa Crime Family. *Sheppard v. Beerman* (2d Cir.) involved the discharge of a law clerk, *Jeffries v. Harleston* (2d Cir.) involved limiting a college professor's term as chairman of the Black Studies department, *Gardetto v. Mason* (10th Cir.) involved the demotion and suspension of a college counselor, and *Dunn v. Carroll* (8th Cir.) involved the discharge of a fire fighter. Pet. Cert., pp. 9-10. Each of those cases was decided in a

substantially different employment context from the one in this matter. The type of work and the disruption perceived in those cases cannot be fairly compared with the type of work performed by a special police unit that works with other law enforcement agencies in combating drug-related criminal activity. Under *Pickering*, *Connick* and *Waters*, the court must give deference to the type of government employment being scrutinized. Ample evidence at trial supported and justified the respondents' decision to transfer the petitioner out of DETF, despite his appearance at the bail hearing. The reasons given were reasonable and the significant deference given by the courts below to the respondents' employment decision was consistent with this Court's analysis in *Waters*. The Third Circuit simply did not carve out a new standard based on a government employer's objective belief that the speech was potentially disruptive. Rather, the Third Circuit deferred to the wisdom of not requiring a police department to wait for instances of actual disruption before transferring an employee to another unit within the department.

II. UNDER THE FACTS AND RULINGS OF THE LOWER COURTS IN THIS CASE, CERTIORARI SHOULD NOT BE GRANTED "TO DECIDE THE IMPORTANT QUESTION WHETHER THE CAUSE OF ACTION CREATED BY THE CIVIL RIGHTS ACT, 42 U.S.C. § 1985(2), FOR CONSPIRACIES TO INJURE WITNESSES IN FEDERAL COURT PROCEEDINGS, SHOULD BE LIMITED IN ANY MANNER BY CONSIDERATION OF THE GOVERNMENT'S ASSERTED INTERESTS IN PREVENTING DISRUPTION CAUSED BY THE TESTIMONY IN COURT."

The respondents fail to see how the Third Circuit and Federal District Courts' decisions impermissibly limited the petitioner's claim brought under 42 U.S.C. § 1985(2). Reliance on *Kush v. Rutledge* as support for this argument is, therefore, misplaced.

The Third Circuit affirmed the District Court's dismissal of this claim because the underlying act--transfer of the petitioner from the DETF unit to patrol after learning the petitioner had appeared at a bail hearing on behalf of a reputed mob associate--was not unlawful. Pet. App., p. 18a. The Court affirmed also on the basis of the District Court's reasons. Pet. Cert. App., p. 18a. Common sense and logic require that, if the underlying act for which one claims is evidence of a conspiracy is not unlawful, then the co-conspirators cannot otherwise be liable simply because they may have acted together. See, Pet. Cert. App., p. 44a.

It is noteworthy that, in dismissing this claim, the District Court considered the respondents' claims of qualified immunity *and* the petitioner's points for charge on the conspiracy claim. Id. The petitioner "set forth in his points for charge that a conspiracy occurs when two or more persons reach an understanding to reach an unlawful purpose." Id. The District Court ruled that the transfer was lawful and that the respondents were qualifiedly immune. Id.; see also, Pet. App., pp. 41a-44a (District Court's ruling and discussion on qualified immunity).

The District Court also ruled that the petitioner had not offered sufficient evidence of injury as a result of his reassignment or transfer. Pet. App., pp. 44a-45a. Injury is an element of a § 1985(2) claim in the first part. *See, Kush v. Rutledge*, 460 U.S. 719, 723 n. 4 (1983). The District Court reasoned that the evidence presented by the petitioner on injury

was "too speculative for the Court to put to the jury on both the basis upon which [the petitioner] might be entitled to overtime and factoring in the precise stipulation of the actual experience." Pet. Cert. App., pp. 45a-46a. Without proof of injury as a result of his transfer, the petitioner's claim under § 1985(2) must fail.

The Third Circuit's affirmance of the District Court's dismissal of this claim did not constitute an impermissible limitation on a cause of action under 42 U.S.C. § 1985(2).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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